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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 313

A. N. O'KEEFFE, as Surviving Executor of and under the Last Will and Testament and Codicils Thereto of Frank Adams, Deceased; OLIN E. WATTS, as Administrator of the Estate of Rubye W. Adams, Deceased; FRANK O. WILDER, PEARL W. POWELL, and MARY SLADE,

Appellants,

vs.

C. L. ADAMS, F. CLAUDE ADAMS, R. STANLEY ADAMS, MILDRED ADAMS WALTON and W. H. WALTON, Her Husband; EULA POWELL ADAMS, EULA POWELL ADAMS and LLOYD SMITH, as Executors under the Last Will and Testament of Lawrence S. Adams, Deceased; EULA POWELL ADAMS and LLOYD SMITH, as Trustees under the Last Will and Testament of Lawrence S. Adams, Deceased, and MAMIE ADAMS SMITH and CLARENCE L. SMITH, Her Husband,

Appellees.

STATEMENT OF APPELLEES MAKING AGAINST JURISDICTION.

The appellees, C. L. Adams, F. Claude Adams, R. Stanley Adams, Mildred Adams Walton and W. H. Walton, her

husband, Eula Powell Adams, Eula Powell Adams and Lloyd Smith, as Executors under the Last Will and Testament of Lawrence S. Adams, deceased, Eula Powell Adams and Lloyd Smith, as Trustees under the Last Will and Testament of Lawrence S. Adams, deceased, and Mamie Adams Smith and Clarence L. Smith, her husband, in pursuance of Rule 12, paragraph 3, of this Court, state the following matters making against the jurisdiction of this Court, asserted by the appellants.

It affirmatively appears from appellants' statement respecting jurisdiction that no substantial Federal question exists as a basis for this appeal.

The ground relied upon by appellants is that the Florida statute (Chapter 18,999, Laws of Fla. 1939) denies equal protection of the laws under the 14th Amendment to the Federal Constitution.

The statute assailed defines a widow's portion in the estate of her deceased husband. It deals with this limited phase of the broader question of descent and distribution. It does not operate when the decedent leaves no descendants. But when a husband is survived by lineal descendants, the statute puts a widow who gave to him such lineal descendants in one class; and puts a widow who gave him none of his descendants into another class. In neither class is the widow denied participation in her husband's estate. For the first class dower is one-third of the gross estate; for the second class, a child's part. The subsequent childless wife is simply placed upon an equality with the testator's children by a previous marriage. Whether the husband leave a will or die intestate, the widow's portion is defined and controlled by the statute.

The assault by the appellant on the statute may be thus stated: That the State cannot distinguish between a widow who bore a testator children and a later wife who bore him none; that the State cannot allow a greater dower to a

widow who gave to the testator blood descendants than to a later wife who did not; that the State is without power to limit the portion of a subsequent childless wife in order to protect the inheritance of the lineal descendants of the testator by an earlier marriage; that the law cannot limit to a child's part the participation of a subsequent childless wife when descendants through a former marriage survive; specifically, that any such distinction in a State statute denies the equal protection of the law to the subsequent childless widow and to the testator.

None of these grounds raise any Federal question.

Dower is the concern of the State, not the Federal Government. It is not an inherent right, the local law gives it or takes it away. Its definition, kind, classification, limits, even its existence, depends upon State law (*Conner* v. *Elliot*, 18 How. 591, 15 L. Ed. 497; 12 Am. Jur. 110; 20 A. L. R. Note p. 1332; 17 Am. Jur. 659). "During the life of the husband, the right is a mere expectancy or possibility. In that condition of things, the law making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it, or wholly take it away" (*Randall* v. *Krieger*, 90 U. S. 137, 23 L. Ed. 124, 126).

Treating of the inapplicability of the 14th Amendment this Court recently held, in a case where widows were classified as resident or non-resident:

> "Dower is not a privilege or immunity of citizenship, either state or Federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each state as respects property within its limits. Conner *v.* Elliott, 18 How. 591, 15 L. Ed. 497. *Neither Sec. 2 of Article 4 nor the 14th Amendment* takes from the several states the power to regu-

late this subject; nor does either make it a privilege or immunity of citizenship. Maxwell *v.* Bugbee, 250 U. S. 525, 537, 538, 63 L. ed. 1124, 1130, 1131, 40 Sup. Ct. Rep. 2, and cases cited; United States *v.* Wheeler, 254 U. S. 281, 296, 65 L. Ed. 270, 274, 41 Sup. Ct. Rep. 133."

Evelyn P. Ferry v. *Spokane, Portland & Seattle Ry. Co.*, 258 U. S. 314, 66 L. Ed. 635, 42 S. Ct. 358, 20 A. L. R. 1328.

Such was the reasoning of the Supreme Court of Florida in the opinion in this case:

"Dower is that portion of the deceased husband's estate admeasured to the widow for her support and the support of the children. It is not a vested right, a privilege, or an immunity protected by the Constitution. * * * Common law dower has been changed by statute in England and is rarely the same in any two jurisdictions. It has been regulated by statute to meet local conditions and with the view of providing ample support for the widow from such properties as the husband may die possessed of. * * * Neither can we say that such a classification is not based on a fair and reasonable economy. Since the basis of it is bread for the widow and children, it cannot be said that the needs of the childless widow are the equivalent of those of the widow on whom there are dependent children."

If dower as such is so clearly a matter of State law, then the State's definition of it, quantitatively, and the classification of its recipients would seem to be unquestionably a State function.

In its broader aspect the subject of dower is simply a part of the larger field of descent and distribution. The right to dispose of property by last will and testament is not a common right or an inherent right or a constitutional privilege. It exists wholly by virtue of statute. And it is

subject to change, amendment, and modification in the discretion of the legislature (Page on Wills, 2nd Ed., Vol. 1, Sec. 22, pp. 37-40; Schouler on Wills, Vol. 1, Sec. 15, pp. 17, 18; 26 Ruling Case Law, Wills, Sec. 10, p. 67; 68 Corpus Juris, Wills, Sec. 7, p. 414).

Such has been the uniform holding of this Court (*United States* v. *Fox*, 94 U. S. 315, 24 L. Ed. 192; *United States* v. *Perkins*, 163 U. S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; *Moffitt* v. *Kelly*, 218 U. S. 400, 54 L. Ed. 1086, 31 S. Ct. 79, 30 L. R. A. (N. S.) 1178). And classifying as between lineal descendants and collateral relatives and strangers to the blood is unobjectionable (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594; *Maxwell* v. *Bugbee*, 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2).

The *Perkins* case, *supra*, held: "• • • the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control;" and then traced out, interestingly, the laws of various nations protecting the inheritance of blood descendants against claims of the widow notwithstanding testamentary disposition. The appellants stress that this statute was amended in 1941, a year after the decedent's death and the taking effect of his will. That is of no consequence—the amendment no more raised a Federal question than did the passage of the original Act or any other Acts on descent and distribution.

It is therefore submitted that the question now presented is one solely of State law, that it is not a Federal question, and, therefore, there is no jurisdiction on this appeal.

There is no basis for writ of error even when a once substantial Federal question is presented, if such question has been clearly foreclosed by former decisions (*Leonard* v. *Vicksburg, etc., R. Co.*, 198 U. S. 416, 49 L. Ed. 1108, 25 S. Ct. 750; *Equitable Life Assur. Assoc.* v. *Brown*, 187

U. S. 308, 47 L. Ed. 190, 25 S. Ct. 123, 125; *Fleming* v. *Fleming*, 264 U. S. 29, 68 L. Ed. 547, 44 S. Ct. 246). With even more force would it seem to follow that when this Court has repeatedly decided that the question presented is not a Federal question, but one for State decision, then no basis for appeal exists.

WHEREFORE, appellees respectfully suggest that no substantial Federal question is disclosed by the record so as to invoke the jurisdiction of the United States Supreme Court upon the appeal from the judgment and decree of the Supreme Court of Florida construing and applying a State statute on descent and distribution dealing with a widow's portion in the estate of her deceased husband located in the State of Florida.

Respectfully submitted,

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